Building The Wireless Future™

April 29, 1997

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Mr. William F. Caton
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EX PARTE OR LATE FILED

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APR 29 1997
Federal Communications Commission
Office of Secretary

Re: Ex Parte Presentation - CC Docket No. 96-45
Universal Service

Dear Mr Caton:

On Tuesday, April 29, 1997, Dr. Brian F. Fontes, Senior Vice President for Policy and Administration, Mr. Randall S. Coleman, Vice President for Regulatory Policy and Law, Mr. Michael Altschul, Vice President/General Counsel, CTIA, and Mr. Jonathan Chambers of Sprint Spectrum met with Mr. Dan Phythyon, Acting Chief of the Wireless Telecommunications Bureau in connection to the above-captioned proceeding. The discussions reflected CTIA's position as already stated for the record. In addition, a copy of the attached materials were delivered to Ms. Suzanne Toller, Legal Advisor to Commissioner Chong.

Pursuant to Section 1.1206 of the Commission's Rules, an original and one copy of this letter and the attachments are being filed with your office. If you have any questions concerning this submission, please contact the undersigned at (202) 736-2982.

Sincerely,

Dianna M. Morris
Executive Coordinator for
Policy and Administration

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Attachment

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List ABCDE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MOUNTAIN SOLUTIONS, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 97-2116-KHV
	)	
THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO SOUTHWESTERN BELL TELEPHONE COMPANY'S MOTION TO DISMISS

Southwestern Bell Telephone Company ("SWBT") boldly comes before this Court requesting to intervene in a case the outcome of which will have no effect on SWBT, and, more audaciously, requesting the Court to dismiss the Complaint. Not only does SWBT have no business in a dispute between Commercial Mobile Service ("CMS") providers and the Kansas Corporation Commission ("KCC"), but its arguments for dismissal are wholly without merit. Therefore, even assuming the Court finds that SWBT may intervene, plaintiffs respectfully request that SWBT's Motion to Dismiss be denied.[1]

I.

NATURE OF MATTER

This case is brought by ten CMS providers against the Kansas Corporation Commission ("KCC"), the three KCC commissioners, the Attorney General of Kansas, and the National

[1] The reasons SWBT should not be allowed to intervene are set forth in plaintiffs' Memorandum of Law in Opposition to SWBT's Application for Intervention, filed contemporaneously herewith. Plaintiffs respectfully request the Court to rule on SWBT's Application to Intervene before considering its Motion to Dismiss. If the Application to Intervene in fact is denied, SWBT's Motion to Dismiss becomes moot.

Exchange Carrier Association, Inc. ("NECA"). Plaintiffs claim that provisions of a December 27, 1996 Order of the KCC, and the state statute under which those provisions were promulgated, violate the Supremacy Clause of the United States Constitution in that they are directly preempted by federal law, 47 U.S.C. § 332(c)(3). The present matter before the Court is whether, assuming Southwestern Bell Telephone Company may properly intervene in this case, plaintiffs' Complaint should be dismissed because (1) the relief requested by plaintiffs would violate the Johnson Act, 28 U.S.C. § 1342; (2) plaintiffs have failed to exhaust their administrative remedies with the Federal Communications Commission ("FCC"), pursuant to 47 U.S.C. § 253(d), and/or (3) plaintiffs' preemption claim fails to state a claim as a matter of law.

II.

STATEMENT OF FACTS[2]

Plaintiffs Mountain Solutions, Inc., Sprint Spectrum, L.P., Liberty Cellular, Inc., Topeka Cellular Telephone Company, Inc., Airtouch Cellular of Kansas, Inc., Mercury Cellular of Kansas, Inc., Western Wireless Corporation, CMT Partners, DCC PCS, Inc., and Dobson Cellular of Kansas/Missouri, Inc. ("plaintiffs") are all providers of cellular or mobile ("wireless") telephone services. On December 27, 1996, the KCC issued its Order (the "December 27 Order") requiring plaintiffs, among others, to make contributions to the Kansas Universal Service Fund ("KUSF") pursuant to K.S.A. 66-2001 et. seq. On March 4, 1997, plaintiffs filed their Complaint for declaratory and injunctive relief, arguing that the KCC's attempt under K.S.A. 66-2008(b) to compel them to contribute to the KUSF violates the Supremacy Clause of the United States Constitution because it is preempted by 47 U.S.C.

[2] SWBT, in its Statement of the Facts, has improperly cloaked legal arguments as facts. For example, SWBT states that "47 U.S.C. § 332(c)(3) applies only to state regulation of cellular entry or pricing" and "the KCC has not regulated cellular entry or pricing." SWBT Mem. at 2. These are purely legal arguments, and therefore should be disregarded as facts.

§ 332(c)(3). On March 17, 1997, SWBT filed both an Application to Intervene and a Motion to Dismiss the Complaint. This Memorandum of Law is submitted solely in response to SWBT's Motion to Dismiss.

III.

QUESTIONS PRESENTED

A. Whether the declaratory and injunctive relief requested by plaintiffs violates the Johnson Act, 28 U.S.C. § 1342.

B. Whether plaintiffs' Complaint is barred for failure to raise the preemption issue before the FCC pursuant to 47 U.S.C. § 253(d).

C. Whether plaintiffs have stated a claim that K.S.A. 66-2008(b) and the KCC's December 27, 1996 Order are preempted by 47 U.S.C. § 332(c)(3).

IV.

ARGUMENT

A. STANDARD OF REVIEW.

To prevail on a motion to dismiss for failure to state a claim, the movant must meet a high standard. S.A.I., Inc. v. General Elec. Railcar Services Corp., 935 F. Supp. 1150, 1152 (D. Kan. 1996). Dismissal of a complaint for failure to state a claim is a harsh remedy to be used cautiously so as to promote the liberal rules of pleading while protecting the interests of justice. Mounkes v. Conklin, 922 F. Supp. 1501, 1506 (D. Kan. 1996). The issue before the court on a motion to dismiss is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to offer evidence to support the claims. Fusion, Inc. v. Nebraska Aluminum Castings, Inc., 934 F. Supp. 1270, 1272 (D. Kan. 1996). On a motion to dismiss, the court judges the sufficiency of the complaint, accepting as true the well-pleaded factual allegations and drawing all reasonable inferences in favor of plaintiffs. Boyer v. Bd. of County Com'rs of

Johnson County, 922 F. Supp. 476 482 (D. Kan. 1996). Dismissal of a complaint under Fed. R. Civ. P. 12(b)(6) is appropriate *only* where it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery, or where an issue of law is dispositive. Fusion, Inc., 924 F. Supp. at 1272. By these standards, SWBT's Motion should be denied.

B. THE JOHNSON ACT, 28 U.S.C. § 1342, HAS NO APPLICATION HERE.

SWBT argues that the Johnson Act, 28 U.S.C. § 1342, deprives this Court of jurisdiction to hear the Complaint.[3] (SWBT Mem. at 4.) SWBT is wrong.

The Johnson Act states:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a state administrative agency or a rate-making body of a state political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; *and*
> (2) The order does not interfere with interstate commerce; *and*
> (3) The order has been made after reasonable notice *and* hearing; and,
> (4) A plain, speedy and efficient remedy may be had in the courts of such state.

28 U.S.C. § 1342 (1948) (emphasis added). All four of the statutory criteria must be satisfied if federal jurisdiction is to be precluded. Arkansas Power & Light Co. v. Missouri Public Service Comm'n, 829 F.2d 1444, 1449 (8th Cir. 1987).

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[3] Though not clear, SWBT also appears to argue that plaintiffs' Complaint would affect those portions of the KCC's December 27 Order that require SWBT to reduce its rates and provide for a revenue neutral assessment. SWBT Mem. at 4. To the contrary, plaintiffs challenge only those portions of the Order that require them, as mobile service providers, to contribute to the KUSF. It is these provisions that violate federal law and therefore the Supremacy Clause.

The first Johnson Act criterion is not satisfied here, and therefore the Johnson Act has no application to this action.[4] Plaintiffs claim that a federal statute preempts those portions of the state statute, and the December 27 Order promulgated thereunder, that require wireless telephone services providers to contribute funds to the KUSF. As a result, jurisdiction is not based "solely" on "repugnance of order to the Federal Constitution," but also on the December 27 Order's conflict with a *federal statute*.

The court in Arkansas Power & Light confronted this precise issue and held that the Johnson Act did not preclude federal jurisdiction. In that case, the plaintiff power company sued the state commission alleging that the manner in which the commission was requiring utilities to pass on rates to customers violated, and was preempted by, federal law. 829 F.2d at 1445. The commission, like SWBT here, argued that the Johnson Act precluded federal jurisdiction. Id. at 1448. The court disagreed:

> The first [Johnson Act] criteria ha[s] not been met here.... Jurisdiction is not based "solely" on either diversity on or "repugnance of the [rate] order to the Federal Constitution." It is based, in part at least, on the theory, not at all insubstantial, that the [Commission's] refusal of interim relief was in conflict with and preempted by the Federal Power Act. It is true, of course, that a federal statute overrides conflicting state law only because of the Supremacy Clause of the Federal Constitution. In a sense, therefore, a preemption claim always asserts repugnance of state law to the Federal Constitution. But such a claim does not usually require that the Constitution itself be interpreted. Rather, the meaning of federal statutes and of state law must be explored, and the extent of any conflict must be ascertained. *A state law struck down on the basis of preemption is perhaps more aptly labeled "unstatutory" than "unconstitutional."*

Id. at 149 (citations omitted) (emphasis supplied).

---

[4] Plaintiffs also dispute that this action involves an "order affecting rates chargeable by a public utility." However, because the first enumerated criterion is not met, it is not necessary to burden the Court with arguments on this issue.

Courts from the Third, Fourth, Fifth and Ninth Circuits have reached the same conclusion. See Freehold Cogeneration Associates, L.P. v. Bd. of Regulatory Com'rs of the State of New Jersey, 44 F.3d 1178, 1185-86 (3rd Cir. 1995); Hawaiian Tel. Co. v. Public Utils. Comm'n, 827 F.2d 1264, 1273 (9th Cir. 1987), cert. denied, 487 U.S. 1218, 108 S. Ct. 2870, 101 L.Ed.2d 906 (1988); New Orleans Pub. Serv., Inc. v. New Orleans, 782 F.2d 1236, 1242-42 (5th Cir. 1986), withdrawn in part on other grounds, 798 F.2d 858 (5th Cir. 1986), cert. denied, 481 U.S. 1023, 107 S.Ct. 1910, 95 L.Ed.2d 515 (1987); Aluminum Co. of America v. Utilities Comm'n of North Carolina, 713 F.2d 1024, 1028 (4th Cir. 1983), cert. denied, 465 U.S. 1052, 104 S.Ct. 1325, 79 L.Ed.2d 722 (1984); International Bhd. of Elec. Workers, Local Union No. 1245 v. Public Serv. Comm'n, 614 F.2d 206, 210 (9th Cir. 1980).

SWBT, on the other hand, relies on Tennyson v. Gas Service Co., 506 F.2d 1135 (10th Cir. 1974). (SWBT Mem. at 6.) However, Tennyson is inapposite, as it did not involve a federal preemption claim. Rather, it concerned a challenge to the state ratemaking procedure *on federal due process grounds*. Id. at 1136. As a result, the court applied the Johnson Act only because it was clear that the claims therein were based "solely" on a repugnance to the Federal Constitution. By contrast, the claims in the present case are, at best, mixed statutory and constitutional claims.

Moreover, the history of the Johnson Act demonstrates that it was enacted to foreclose attacks on state rate making procedures in federal court on due process grounds, which had become commonplace and were impeding the states in their regulatory efforts. Those same concerns do not apply where a state acts in direct violation of a federal statute. See e.g., Int'l Brotherhood of Electrical Workers, 614 F.2d at 210-11.

Because this is a statutory preemption case and not a federal due process case, Tennyson does not apply. SWBT's argument that the Johnson Act deprives this Court of jurisdiction must fail, and SWBT's Motion to Dismiss should be denied.[5]

C. PLAINTIFFS WERE NOT REQUIRED TO SUBMIT THEIR PREEMPTION CLAIM TO THE FCC UNDER 47 U.S.C. § 253(D) PRIOR TO SEEKING RELIEF IN THIS COURT.

SWBT argues that the Complaint should be dismissed because 47 U.S.C. § 253(d) required plaintiffs to submit their preemption claim to the FCC prior to seeking relief in this Court, and plaintiffs have failed to exhaust this procedure. (SWBT Mem. at 6-8.) Again, SWBT is wrong.

First, the case cited by SWBT in support of its exhaustion argument specifically states that the exhaustion doctrine applies only where the statute "dictates that exhaustion is required." Coosewoar v. Meridian Oil Co., 25 F.3d 920, 924 (10th Cir. 1994). In the present case, exhaustion is *not* required; 47 U.S.C. § 253(d) does not mandate resort to the FCC, but rather makes such a procedure available if a party wishes to utilize it. As a result, even under the authority cited by SWBT, SWBT's exhaustion argument fails.

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[5] SWBT also argues in passing that the Complaint should be dismissed in the interest of federal/state comity because plaintiffs have filed a Petition for Judicial Review of the December 27 Order in state court. (SWBT Mem. at 6.) SWBT again relies on Tennyson, and its reliance thereon is again misplaced. Tennyson did not involve a preemption claim. This Court has held that abstention is particularly inappropriate where the federal claim is that, by preemption, the state has been ousted from jurisdiction. Trailways, Inc. v. State Corp. Com'n of State of Kansas, 565 F.Supp. 777, 784-85 (D. Kan. 1983); see also Long v. Avery, 251 F.Supp. 541, 549 (D. Kan. 1965) (abstention doctrine is an extraordinary and narrow exception to the duty of the district court to adjudicate a controversy properly before it, and is justified only in exceptional cases). Moreover, this Court obtained jurisdiction first, and because there are no state law issues in the state court proceeding that might moot the preemption issues brought before this Court, abstention is inappropriate. Trailways, Inc., 565 F.Supp. at 785.

Second, SWBT has failed to properly read the statute. While Section 253(d) does contain provisions regarding FCC review of preemption claims, the very next subsection - 253(e) - exempts CMS providers from any provision within Section 253 that conflicts with Section 332(c)(3):

> Nothing in this section shall affect the application of Section 332(c)(3) of this title to commercial mobile service providers.

Section 332(c)(3) is the very provision plaintiffs, as CMS providers, are relying upon for their preemption argument in this case. Federal law requires a finding that CMS is a substitute for land line service before a state may impose upon CMS providers universal service funding obligations. Section 253(d) does not apply to CMS providers where there has been no prior finding of substitutability. SWBT's "exhaustion of remedies" argument therefore fails, and its Motion to Dismiss the Complaint must be denied.

D. FEDERAL PREEMPTION PROHIBITS THE COMMISSION FROM IMPOSING A KUSF OBLIGATION ON CMS PROVIDERS.

SWBT's argument that Section 332(c) does not support plaintiffs' claims is based on a misreading of the statute.

SWBT admits that Section 332(c) preempts states from licensing, and from regulating the rates of CMS providers. SWBT next suggests that the challenged CMS provider contributions to the KUSF fall within the category of "other terms and conditions of commercial mobile services," which the state can regulate. SWBT, however, completely ignores the remaining language in the preemption provision of 332(c):

> Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such state) from requirements imposed by a state commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunication services at affordable rates.

The rules of statutory construction require that none of the language in a statute be read to be redundant, and that all of the language be given effect. See U.S. v. Nordic Village, Inc., 112 S. Ct. 1011, 117 L. E.2d 181 (1992) (statute must be construed in such a fashion that every word has some operative effect); Pacific Minerals, Inc. v. Director, Office of Workers Compensation Programs, U.S. Department of Labor, 927 F.2d 1150 (10th Cir. 1991) (court will not construe statute in a manner that renders words or phrases meaningless, redundant or superfluous); American Stores Company v. American Stores Co. Retirement Plan, 928 F.2d 986 (10th Cir. 1991) (courts should attempt to give some reasonable meaning to all words included in a legislative enactment). SWBT's interpretation of the Communications Act violates these fundamental and elementary rules of statutory construction because it, in effect, reads the quoted language out of the statute.

The Connecticut Superior Court recently applied these principles when it analyzed the scope of Section 332(c) in Metro Mobile CTS of Fairfield County, Inc. v. Connecticut Dep't. of Public Utility Control, 1996 WL 737480 (Conn. Superior Court, December 9, 1996) (attached at Tab A). At issue there, as here, was whether a cellular service provider could be compelled to pay to support universal service. The Court rejected the same arguments advanced by SWBT here:

> Because the former excerpt from the Preemption Clause grants to the states the authority to regulate "other terms and conditions" of cellular service, the latter excerpt, which expressly exempts from preemption any assessments for universal and affordable service where cellular service is a significant substitute for land line service, would be redundant if such assessments were among "other terms and conditions" of cellular service and thereby already exempt.
>
> By expressly exempting from preemption those assessments which are made on cellular providers in a state in which cellular service is a substitute for land line service, Congress left no ambiguity that *cellular providers in states in which cellular is not a substitute for land line service fall under the umbrella of federal preemption.* Accordingly, it is held that

> the Budget Act preempts the DPUC from assessing Metro Mobile for payments to the Universal Service and Lifeline Programs.

Metro Mobile, 1996 WL 737480 *3 (emphasis supplied).

Consistent with Metro Mobile and with general rules of construction, the Communications Act provides not only that the KCC cannot regulate rates and entry requirements, but that it cannot impose universal service funding obligations on CMS providers in the absence of a finding that CMS providers in Kansas are a substitute for land line telecommunications services. No such finding was ever made, or even attempted.

Perhaps recognizing the weakness of its arguments, SWBT attempts a diversion. SWBT directs the Court's attention to 47 U.S.C. § 254(f). That subsection, enacted as part of the Telecommunications Act of 1996, provides in part as follows:

> A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State.

47 U.S.C.A. § 254(f) (West 1997). SWBT contends that this statute authorizes the defendants to assess KUSF fees to CMS providers, despite the express language of Section 332(c). This argument, however, like its predecessor, runs afoul of the most basic canons of statutory construction.

First, Section 332(c) is specific in application to "commercial mobile services." As such, it controls over the provisions of Section 254(f), which are general. See Gozlon-Peretz v. United States, 498 U.S. 395, 111 S.Ct. 840, 848, 112 L.Ed.2d 919 (1991). Second, the statutes are not mutually exclusive. Indeed, they must be harmonized to the extent possible. Negonsott v. Samuels, 933 F.2d 818, 819 (10th Cir. 1991). Such harmony is easily achieved here. Taken together, the statutes provide that states can require CMS providers to contribute to universal

service funds in accordance with Section 254 as long as the requirements of Section 332(c) are met; namely, that there is a finding that commercial mobile services are a substitute for land line telephone exchange services for a substantial portion of communications within a given state. In this case, no such finding was made.[6] Finally, and significantly, nothing in Section 254(f) or the Telecommunications Act of 1996 modifies, much less repeals, Section 332(c). If Congress had wanted to change Section 332(c) when it passed the 1996 Telecommunications Act, it would have done so.

SWBT attempts to cloud the issue further by suggesting that plaintiffs are really trying to broaden the preemption mandate of Section 332(c) to include any decision by the KCC that has any effect on SWBT's rates.[7] Plaintiffs have not made this argument, nor would it make sense to do so. Plaintiffs only ask this Court to find preempted those parts of the KCC's Orders and the State Act that require CMS providers to contribute to the Kansas Universal Service Fund.

The remaining portions of SWBT's suggestions do not even address the preemption issue before the Court.[8] This issue, as stated above, is based on the clear language of Section 332(c),

---

[6] Quite the contrary: The only evidence before the Commission when it considered the KUSF on August 12-15, 1996 supports a finding that commercial mobile service providers *are not* a substitute for land line telephone exchange services within the State of Kansas. (Lammers Direct, page 27 lines 14-15, T 3024 lines 5-14) (Attached hereto at Tab B.)

[7] SWBT's reliance on Cable Television Association of New York, Inc. v. Finnerand, 954 F.2d 91 (2d Cir. 1992), for this proposition is inapposite. Cable Television interpreted a statute that does not mention universal service funding obligations.

[8] SWBT's blanket assertion that the FCC decision attached to plaintiffs' Memorandum in Support as Exhibit B, supports SWBT's position is contrary to the wording of the decision. In the decision, the FCC stated as follows:

> Our decision to proceed under Section 251 as a basis for regulating LEC-CMRs interconnection rates should not be interpreted as undercutting our intent to

(continued...)

which cannot be read or interpreted out of the Communications Act and which prevents the KCC from ordering plaintiffs to contribute to the KUSF in absence of a substitutability finding.

V.

CONCLUSION

Based on the foregoing, plaintiffs respectfully request that this Court deny SWBT's Motion to Dismiss plaintiffs' Complaint.

Respectfully submitted,

SONNENSCHEIN NATH & ROSENTHAL

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-and-

[8](...continued)
enforce Section 332(c)(3)....

MORRISON & HECKER, L.L.P.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was sent via facsimile and U.S. Mail, postage prepaid, this 21st day of March, 1997, to:

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ATTORNEY FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MOUNTAIN SOLUTIONS, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 97-2116-KHV
	)	
THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS'[1] PROPOSED[2] REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR APPLICATION FOR PRELIMINARY INJUNCTION

Southwestern Bell Telephone Company ("SWBT") has filed an Application to Intervene in this case. The Court has not yet ruled that SWBT may intervene. Nonetheless, SWBT has proceeded as if it were a proper party and has filed a Memorandum of Law in Opposition to Plaintiffs' Application for Preliminary Injunction ("SWBT's Opposition"). For the reasons set forth in Plaintiffs' Memorandum in Support of Their Motion to Strike SWBT's Opposition, filed contemporaneously herewith, the Court should strike SWBT's Opposition. In the event the Court overrules plaintiffs' Motion to Strike, however, plaintiffs submit this abbreviated Proposed

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[1] This Proposed Reply Memorandum is submitted solely on behalf of Plaintiffs Mountain Solutions, Inc., Sprint Spectrum, L.P., Liberty Cellular, Inc., Mercury Cellular of Kansas, Inc., Western Wireless Corporation, DCC PCS, Inc. and Dobson Cellular of Kansas/Missouri, Inc. For the convenience of the Court and in the interests of simplicity, these parties will be referred to herein as "plaintiffs." Airtouch Cellular of Kansas, Inc., Topeka Cellular Telephone Company, Inc. and CMT Partners do not join in this Reply.

[2] Plaintiffs submit this Reply Memorandum in response to Southwestern Bell Telephone Company's ("SWBT's") Memorandum in Opposition to Plaintiffs' Application for Preliminary Injunction conditionally, only in the event the Court grants SWBT's Application to Intervene and does not strike SWBT's Memorandum in Opposition.

Ex. A

Reply Memorandum in Support of their Application for Preliminary Injunction, responding to SWBT's arguments.[3]

I.

INTRODUCTION

SWBT is up-front about its complaints: It claims that if plaintiffs prevail, SWBT and the independent local exchange carriers ("ILECs") will be forced to pay more to the Kansas Universal Service Fund ("KUSF"), a result SWBT wants to avoid. (SWBT's Opp. at 1-2.) SWBT's desire to save money, however, does not justify the illegal KUSF assessment on plaintiffs. SWBT also complains that precluding the assessment against plaintiffs would "interrupt" the state-established program. This program, however, violates federal law. Congress never intended commercial mobile service ("CMS") providers such as plaintiffs to be subject to state-mandated contributions to universal service funds and expressly preempted such contributions by statute. Plaintiffs merely ask this Court to require the State and the Kansas Corporations Commission ("KCC") to do what Congress requires, and treat SWBT, the ILECs and plaintiffs in the manner Congress contemplated.

Plaintiffs have satisfied each of the four elements necessary to the entry of a preliminary injunction. SWBT's argument that plaintiffs have not demonstrated that they are likely to prevail on the merits of their preemption claim is based on a tortured construction of the relevant statutes, in violation of the intent of Congress and elementary rules of statutory construction. SWBT attacks plaintiffs' claims of irreparable harm as "speculative." However, SWBT ignores the true nature and extent of the harm facing plaintiffs if a preliminary injunction is not issued.

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[3] Plaintiffs have also filed, and incorporate herein by reference, their Reply Memorandum in Support of their Application for Preliminary Injunction ("Plaintiffs' Reply Mem."), responding to the arguments in opposition made by the named defendants.

SWBT's claim that it and other local exchange carriers will suffer "hardships" if CMS providers are not forced to contribute to the KUSF begs the ultimate question: if Congress did not intend to allow States to impose universal service funding requirements on CMS providers, then the obligations that others such as SWBT must bear because they *are* subject to a funding mandate are not "hardships" at all. Finally, SWBT's argument that the public interest in the KUSF will be adversely affected if a preliminary injunction is issued ignores the reality that an injunction will not dismantle the KUSF, and any "interference" with the current state plan pales in comparison to the public interest in assuring that public officials abide by the law.

I.

ARGUMENT

A. PLAINTIFFS HAVE DEMONSTRATED A LIKELIHOOD THEY WILL SUCCEED ON THE MERITS OF THEIR CLAIM THAT 47 U.S.C. § 332(C)(3) PREEMPTS K.S.A. 66-2008(B) AND THE KCC REGULATIONS PROMULGATED THEREUNDER.

Against the plain language of 47 U.S.C. § 332(c)(3), SWBT argues that this statute doesn't apply to the KUSF assessment levied against plaintiffs. That subsection provides in relevant part as follows:

> (3) State preemption
>
> (A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. *Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.* Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service

> and the Commission shall grant such petition if the State demonstrates that . . . .

47 U.S.C. § 332(c)(3) (emphasis added).

Despite this clear language, SWBT spends nearly three pages of its opposition brief asserting that Section 332(c)(3) concerns only "rate or entry" regulations. Because, SWBT asserts, a state mandate to contribute to a universal fund is not a "rate or entry" regulation, neither K.S.A. 66-2008(b) nor the KCC regulations promulgated thereunder are preempted. SWBT ignores the language highlighted above. This is improper.

Well-settled rules of statutory construction require that none of the language in a statute be read to be redundant, and that all of the language be given effect. See U.S. v. Nordic Village, Inc., 112 S. Ct. 1011, 117 L. E.2d 181 (1992) (statute must be construed in such a fashion that every word has some operative effect); Pacific Minerals, Inc. v. Director, Office of Workers Compensation Programs, U.S. Department of Labor, 927 F.2d 1150 (10th Cir. 1991) (court will not construe statute in a manner that renders words or phrases meaningless, redundant or superfluous); American Stores Company v. American Stores Co. Retirement Plan, 928 F.2d 986 (10th Cir. 1991) (courts should attempt to give some reasonable meaning to all words included in a legislative enactment); Good v. Roy, 459 F.Supp. 403 (D. Kan. 1978) (a cardinal rule of statutory construction is that a statute must be read in its entirety, without isolating particular parts thereof). SWBT's interpretation of the Communications Act violates these fundamental and elementary rules of statutory construction by, in effect, reading the highlighted language out of the statute.

The Connecticut Superior Court recently applied these principles when it analyzed the scope of Section 332(c) in Metro Mobile CTS of Fairfield County, Inc. v. Connecticut Dep't. of Public Utility Control, 1996 WL 737480 (Conn. Superior Court, December 9, 1996) (attached

at Tab A). At issue there, as here, was whether a cellular service provider could be compelled to pay to support universal service. The Court rejected the same arguments advanced by SWBT here:

> By expressly exempting from preemption those assessments which are made on cellular providers in a state in which cellular service is a substitute for land line service, Congress left no ambiguity that *cellular providers in states in which cellular is not a substitute for land line service fall under the umbrella of federal preemption*. Accordingly, it is held that the Budget Act preempts the DPUC from assessing Metro Mobile for payments to the Universal Service and Lifeline Programs.

Metro Mobile, 1996 WL 737480 *3 (emphasis supplied).

Consistent with Metro Mobile and with general rules of construction, the Communications Act provides not only that the KCC cannot regulate rates and entry requirements, but that it cannot impose universal service funding obligations on CMS providers in the absence of a finding that CMS providers in Kansas are a substitute for land line telecommunications services. No such finding was ever made, or even attempted.

SWBT's claim that 47 U.S.C. § 254(f), enacted after the appeal in Metro Mobile was filed, "trumps" Section 332(c)(3) is unavailing. That subsection, enacted as part of the Telecommunications Act of 1996, provides in part as follows:

> A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State.

47 U.S.C.A. § 254(f) (West 1997). SWBT contends that this statute authorizes the defendants to assess KUSF fees to CMS providers, despite the express language of Section 332(c). This argument, however, like its predecessor, runs afoul of the most basic canons of statutory construction.

First, Section 332(c) is specific in application to "commercial mobile services." As such, it controls over the provisions of Section 254(f), which are general. See Gozlon-Peretz v. United States, 498 U.S. 395, 111 S.Ct. 840, 848, 112 L.Ed.2d 919 (1991). Second, the statutes are not mutually exclusive. Indeed, they must be harmonized to the extent possible. Negonsott v. Samuels, 933 F.2d 818, 819 (10th Cir. 1991). Such harmony is easily achieved here. In fact, the interrelationship among the telecommunications statutes proves Congress intended, through Section 332(c), to treat plaintiffs and other CMS providers differently from other telecommunications providers.

Section 332(c)(3) was already the law when Congress passed the Telecommunications Act of 1996, including Sections 253 and 254.[4] Section 253 is entitled "Removal of barriers to entry." Subsection (b) of that statute provides in relevant part that "[n]othing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service . . . ." Subsection (e), entitled "Commercial mobile service providers," then expressly recognizes the continued vitality of Section 332(c)(3):

> Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

47 U.S.C. § 253(e). This explicit reference in Section 253 to Section 254, subject to the limitation of Section 253(e) — and, by explicit extension, Section 332(c)(3) — conclusively establishes that Congress intended to continue to preclude the States from forcing CMS providers to contribute to universal service funds. Any other interpretation would require that Section 332(c)(3) be read out of the statute books, an untenable result. St. Louis, I. M. & S. Ry Co.

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[4] Section 332(c)(3) was enacted in 1993 as part of the Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66 § 6002, 107 Stat. 394 (1993).

v. U.S., 251 U.S. 198, 207, 40 S.Ct. 120, 122 (1920); U.S. v. Trident Seafoods Corp., 92 F.3d 855, 862 (9th Cir. 1996).

Finally, Congress' purpose in preempting states from regulating CMS providers in the context of universal service regulation was to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications industry." House Rep. No. 103-111, 103d Cong., 1st Sess. at 261, reprinted in 1993 U.S.C.C.A.N. at 587. Congress clearly intended to continue this protection of CMS providers when it enacted the Telecommunications Act of 1996, as evidenced by its inclusion of Section 253(e), which explicitly preserves the preemptive effect of Section 332(c)(3). The wisdom of Congress' action is not at issue here, and it is beyond the power of the Kansas legislature and the KCC to thwart the will of Congress. SWBT's tortured interpretation of federal law must be rejected, and plaintiffs' injunction should be granted to prevent defendants from illegally imposing KUSF funding obligations on plaintiffs.

B. PLAINTIFFS WILL SUFFER IRREPARABLE HARM UNLESS A PRELIMINARY INJUNCTION ISSUES.

SWBT claims that plaintiffs will not suffer irreparable harm if forced to contribute — illegally, in plaintiffs' view — to the KUSF. However, as plaintiffs will establish through testimony at the hearing on their application for preliminary injunction, any money plaintiffs are compelled to contribute to the KUSF cannot be recouped. This is because the sums contributed to the KUSF are slated for payout to those land line providers — including SWBT — who experience a decrease in revenue due to the implementation of the KUSF program. See December 27 Order of the Kansas Corporation Commission, ¶ 106; SWBT Opp. at 2. Plaintiffs would have no means at law or in equity to recover those monies SWBT and other ILECs draw

from the KUSF under the "revenue neutrality" scheme devised by the KCC to benefit the land line providers.

Apart from the loss of funds paid into the KUSF, plaintiffs will suffer permanent, irreparable harm to their business from the illegal KUSF assessment. The marketplace for CMS services consists of customers who, as a whole, are sensitive to price increases. If all plaintiffs and CMS providers pass KUSF charges to their customers, basic economics dictate that the demand for CMS will decline. There will be fewer customers, and those customers who remain will use fewer commercial mobile services. The "pie" will decrease, and with it the size of each piece. For this loss, which results directly from the unlawful KUSF obligation, plaintiffs have no place to turn to be made whole.

Moreover, in order to implement the KUSF funding requirement in the first instance, plaintiffs will be forced to completely reorganize their billing procedures. These costs will be unrecoverable. Finally, many of the plaintiffs are entities who, if forced to contribute to the KUSF and if they elect not to pass on the cost, risk serious, permanent and noncompensable harm to their businesses. Plaintiffs have met their burden to establish "irreparable harm."[5]

[5] Plaintiffs will present testimony to this Court at its hearing on March 26, 1997 in support of this prong of the inquiry.

C. THE PUBLIC INTEREST IN THE LAWFUL ADMINISTRATION OF THE KUSF OUTWEIGHS ANY ALLEGED HARDSHIPS TO SWBT WHICH COULD RESULT FROM AN INJUNCTION.

SWBT also argues that the fact that it and the ILECs "could" bear the brunt of any shortfall in KUSF funding militates against the grant of a preliminary injunction. (SWBT Opp. at 7.) According to SWBT, the "revenue neutrality" of the program could suffer "*unless alternative mechanisms are established* to allow SWBT and other recipients, who have already reduced rates, to be made whole." (Id.) (emphasis added) SWBT itself therefore recognizes that the answer to its concerns is for the State to formulate a lawful program — not for the State to extract contributions from plaintiffs in violation of federal law. Moreover, the claimed jeopardy to the "revenue neutrality" of the universal service program is a red herring. As SWBT openly admits, the KUSF will continue to exist, and will be fully funded, although without the contributions of CMS providers.[6]

Finally, SWBT's "public interest" argument amounts to this: Because the KCC and Kansas Legislature have chosen to force plaintiffs to contribute to the KUSF, *ipso facto* these actions are in the "public interest." SWBT's tautological "argument" must be rejected. The issue before the Court is whether the practical effect of an injunction implicates a public interest that outweighs plaintiffs' and the public's interest in seeing that the defendants abide by the Constitution and laws of the United States. The balance tips decidedly in plaintiffs' favor. Against the possibility that the State will have to expend resources to lawfully re-formulate the KUSF program, the citizens of Kansas have an important and recognized interest in seeing that

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[6] SWBT also claims it will suffer from an "unequal competitive playing field" if this Court enjoins the KUSF assessment against plaintiffs. (SWBT Opp. at 7.) This argument rests on the patently false premise that SWBT's land-line service is in direct competition with plaintiffs' CMS services, and that the two types of services are in fact substitutes for one another. The KCC has made no such finding, and SWBT has presented this Court with no facts to support such a claim.

their public officials abide by the law. Woodall v. Bartolino, 700 F.Supp. 210, 221 (D. N.J. 1988) (it is in the public interest to enjoin the actions of public officials when those actions are not in compliance with the law). This Court should reject defendants' untenable approach and grant plaintiffs' application for injunctive relief.

II.

CONCLUSION

For the reasons stated herein, plaintiffs request that the Court grant a preliminary injunction prohibiting defendants and SWBT from requiring plaintiffs to contribute to the KUSF, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

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